

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

B-215187

**FILE:**

Ken Baughman

**DATE:** December 26, 1984**MATTER OF:****DIGEST:**

1. Protest of procurement for the construction of a motorcycle trail in a national forest, funded by the state of Washington under an agreement with the United States Forest Service, is reviewable by GAO since the statute authorizing the agreement provides that such funds are to be considered appropriated.
2. An agency's rejection of a bid as nonresponsive based on a finding that one of the bidder's individual sureties on his bid bond is unacceptable because his total outstanding surety obligations are in excess of his net worth is unobjectionable since it is reasonably related to the purpose for which a bid guarantee is intended, namely, to protect the government's financial interest in the event of default on the bid.

Ken Baughman (Baughman) protests the rejection of his low bid under invitation for bids No. R6-84-15C issued by the United States Department of Agriculture, Forest Service, for the construction of a motorcycle trail in the Coville National Forest, Pend Oreille County, Washington.

We deny the protest.

As a preliminary matter, the Forest Service contends that the General Accounting Office lacks jurisdiction to consider this protest because the procurement is being funded entirely by the Department of Natural Resources of the state of Washington under an agreement with the United States Forest Service and, thus, does not involve funds directly appropriated from Congress. The Forest Service bases its determination on our decisions in B-174324, Jan. 12, 1972, and B-146602, Nov. 13, 1961.

This Office considers protests of contract awards pursuant to its authority under 31 U.S.C. § 3526 (1982) to adjust and settle appropriated fund accounts of the United

States. The authority for the agreement between the state of Washington and the Forest Service provides, in pertinent part, that "all moneys received as contributions toward cooperative work in forest investigations, or the protection and improvement of the national forests, shall be covered into the Treasury and shall constitute a special fund, which is appropriated and made available until expended." 16 U.S.C. § 498 (1982). Thus, although the funds for this procurement are not directly appropriated by Congress, they constitute appropriated funds pursuant to the statute which grants authority for the agreement between the state of Washington and the Forest Service. We find the decisions cited by the Forest Service in support of its position that we lack authority to consider this protest to be inapplicable because they concern procurements which do not involve the expenditure of appropriated funds. We also find that this Office has authority to consider this protest.

Under the invitation for bids in this case, bidders were required to submit a bid bond with their bids for 20 percent of the bid price. Because Baughman was bonded by individual rather than corporate sureties, a completed Affidavit of Individual Surety (Standard Form 28) for each individual surety was required to accompany the bond. The contracting officer found Baughman's low bid to be non-responsive based on his determination that one of the individual sureties was unacceptable. The contracting officer found the surety unacceptable based on two deficiencies in his affidavit.

First, the contracting officer found the surety made an error in filling out item 7 of the affidavit which provides space for the surety to list present assets, liabilities and net worth. The surety failed to follow the instructions on the affidavit regarding the calculation of net worth. The contracting officer, finding that this error raised an ambiguity regarding the surety's net worth, recalculated net worth based on the instructions on the affidavit. This resulted in a devaluing of the surety's net worth from \$195,000 to \$115,000. In the agency report, the contracting officer modified his determination of the surety's net worth based on three previous affidavits submitted by the surety in 1982 in connection with other Forest Service procurements. Those affidavits listed the same assets and liabilities as the affidavit in this case and a net worth of

\$120,000. The contracting officer found the surety's net worth to be \$120,000 plus \$5,000 for 1 year's appreciation on his real estate.

Second, item 10 of the affidavit required the individual surety to disclose all other bonds on which he was a surety at the time he executed the bond for Baughman. The surety placed the word "none" under this item. Upon investigation, the contracting officer found that the surety failed to disclose that he was a surety on two other bid bonds, two payment bonds and three performance bonds for other procurements with the Forest Service. The contracting officer determined the total penal amount on all of the surety's bonds, including the bond in the case, to be \$242,977.07. Subtracting the total penal amount on his bonds, \$242,977.07, from his net worth (as determined by the contracting officer), \$125,000, and coming up with a negative figure, the contracting officer found the surety to be unacceptable.

In the agency report, the contracting officer modified his determination to find Baughman nonresponsible based on the unacceptability of the surety rather than nonresponsive based on our decision in Clear Thru Maintenance, Inc., 61 Comp. Gen. 456 (1982), 82-1 C.P.D. ¶ 581, which holds that acceptability of a surety on a bid bond is a matter of responsibility rather than responsiveness. We also held in that decision that where, as here, the bidder whose surety is found nonresponsible is a small business, the Small Business Administration certificate of competency procedures are inapplicable.

Baughman contends that the contracting officer's determination of the unacceptability of the individual surety was arbitrary and capricious, contrary to regulations and erroneous as a matter of fact and law. First, the protester contends that the contracting officer failed to exercise discretion in determining the weight given to other bonds for which the individual was surety. The protester contends that the Forest Service's deduction of the total amount of outstanding bond obligations was improper since most of the contract performance being bonded had been substantially performed.

Second, the protester contends that the contracting officer should have required further certifications showing additional assets, as provided by Federal Acquisition Regulation, § 28.202-2(c), 48 Fed. Reg. 42,102 (1983) (to be

codified at 48 C.F.R. § 28.202-2(c), and paragraph 5 on back of the affidavit, to clear up any ambiguity resulting from the surety's affidavit.

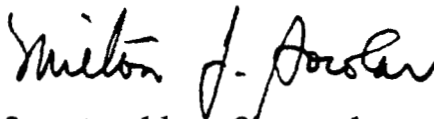
The regulations, in effect for this procurement, required that when a bid bond is executed by two individual sureties, each must have a net worth not less than the penal amount of the bond. Federal Procurement Regulations § 1-10.203(a) (1964 ed.). That section also provides that "the number and amounts of other bonds upon which a proposed surety is bound, and the status of the contracts in connection with which such bonds were furnished, must be considered [by the contracting officer] in determining the acceptability of the individual surety." Because the contracting officer is not required to consider a surety's other bonds in any specific manner, he has discretion to determine how much weight to accord these bonds. In view of this discretion, we have held that we will not object to the contracting officer's treatment of a surety's other bonding obligations unless it appears to have been unreasonable. Clear Thru Maintenance, Inc., 61 Comp. Gen., supra, at 458. Forest Service Procurement Regulation, 4G-10.104-1, Region 6 Supplement, provides the additional guidance that security on contract work shall be maintained for 1 year following completion and acceptance of the work.

In Clear Thru Maintenance, Inc., as in this case, the agency determined the surety's acceptability by subtracting the total penal amount of the surety's outstanding bond obligations from his net worth. In that case, we held that there was no legal basis upon which to object to the agency's determination of the surety's acceptability. See also D.J. Barclay & Company, B-213313, Apr. 24, 1984, 84-1 C.P.D. ¶ 470.

The purpose of the bid guarantee requirement is to protect the government's financial interests in the event the bidder fails to execute the required contract documents and deliver the required performance and payment bonds. To achieve that purpose, it is reasonable for the government to require that both individual sureties on a bond have a net worth at least equal to their total potential bond liabilities, since the amount of those potential liabilities may have a bearing on the financial soundness of each surety, regardless of the actual financial risk involved. Dan's Janitorial Service, Inc., 61 Comp. Gen. 592 (1982), 82-2 C.P.D. ¶ 217.

Thus, the Forest Service was not required to consider the surety's other bonds in any specific way and we have no legal basis to object to the method employed here. Based on our finding above, we need not address whether the agency erred in not seeking additional certifications from the surety regarding his net worth. Even if the contracting officer accepted the surety's net worth as \$195,000, as stated in his affidavit, the total penal amount of all bonds, \$242,977.07, exceeded that amount.

The protest is denied.

*for*   
Comptroller General  
of the United States